

IN THE U.S. DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FITLIFE BRANDS, INC.,)	Case No.
a Nevada corporation,)	
)	
Plaintiff,)	COMPLAINT FOR
)	DECLARATORY JUDGMENT
v.)	OF NON-INFRINGEMENT
)	
MET-RX SUBSTRATE TECHNOLOGY,)	
Inc., a California corporation,)	<u>JURY TRIAL DEMANDED</u>
)	
Defendant.)	
_____)	

COMES NOW the Plaintiff, FitLife Brands, Inc. (“Fitlife Brands”), and for its complaint against the Defendant MET-Rx Substrate Technology, Inc. (“MET-Rx Substrate Technology”), states and alleges as follows:

NATURE OF THE CASE

1. FitLife Brands seeks a declaratory judgment that the marks, “MET-RX” as shown in U.S. Registration Nos. 2058523 and 2169788; the mark, “MET-RX PROTEIN PLUS” as shown in U.S. Registration No. 2556583; the mark “MET-RX AMPED ECN” as shown in U.S. Registration No. 3330938; the mark “MET-RX 180” as shown in U.S. Registration No. 4291038; the mark “MET-RX 180° TRANSFORMING EVERY BODY” as shown in U.S. Registration No. 4294436; the mark “MET-RX MINUTE” as shown in U.S. Registration No. 4281617 (hereinafter collectively, the “MET-RX Trademarks”) are not infringed, and any rights of Met-Rx Substrate Technology are not violated, by FitLife Brands’ use or registration of the mark “METIS NUTRITION” shown in U.S. Trademark Application Serial No. 86/316,091 (“Application”).

2. The relief is necessary because MET-Rx Substrate Technology is asserting that FitLife Brands has infringed, and will continue to infringe, the MET-RX Trademarks by using the trademark "METIS NUTRITION". As FitLife Brands has already launched its new brand, Metis Nutrition, including a new website bearing FitLife Brands' mark "METIS NUTRITION," offering products for sale bearing FitLife Brands' mark "METIS NUTRITION", and selling/shipping product in interstate commerce bearing FitLife Brands' mark "METIS NUTRITION", these accusations have placed a cloud on FitLife Brands' trademark and business. Thus, MET-Rx Substrate Technology's accusations have created a real, immediate, and substantial controversy between the parties.

PARTIES

3. FitLife Brands is a corporation organized under the laws of the State of Nevada, with its principal place of business at 4509 S. 143rd St., Suite 1, Omaha, Nebraska 68137. FitLife Brands is, and was at all times herein mentioned, qualified to do business in Nebraska. FitLife Brands is an international provider of innovative and proprietary nutritional and fitness enhancement products for health-conscious consumers.

4. MET-Rx Substrate Technology is a corporation organized under the laws of the State of California, with its principal place of business at 2100 Smithtown Avenue, Ronkonkoma, New York 11779. MET-Rx Substrate Technology nationally sells, and has sold, vitamin supplements, mineral supplements, nutritional supplements, supplement-enriched foods, dietary supplemental drinks and drink mixes, powders, sports and energy drinks, exercise equipment, gym accessories, instructional fitness materials, and clothing.

JURISDICTION AND VENUE

5. The Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. §§

1051, 1125 (Lanham Act); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1338(a) (trademarks); and 28 U.S.C. §§ 2201, 2202 (Declaratory Judgment Act).

6. The Court has personal jurisdiction over MET-Rx Substrate Technology because, on information and belief, MET-Rx Substrate Technology conducts business in the State of Nebraska, including systematic business contacts with Nebraska retailers in the advertising and sale of its products to Nebraska residents.

7. Venue is proper in this Court under 28 U.S.C. § 1391. In addition, MET-Rx Substrate Technology has sent e-mails and made telephone calls *via* its agent to FitLife Brands' counsel in Omaha, Nebraska, asserting likelihood of confusion in the marketplace between the MET-RX Trademarks with FitLife Brands' mark "METIS NUTRITION," including filing an Opposition in the U.S. Patent and Trademark Office ("USPTO") against FitLife Brands, namely, Opposition Proceeding No. 91219718 (the "Opposition"), and making accusations of trademark infringement and threats of litigation. These facts, under all the circumstances, show that there is an actual controversy between the parties and is causing injury to FitLife Brands' reputation in the industry.

FACTS COMMON TO ALL COUNTS

I. MET-Rx Substrate Technology's Opposition before the USPTO

8. On June 20, 2014, FitLife Brands filed a trademark application with the USPTO for "METIS NUTRITION" for dietary supplements.

9. On September 28, 2014, an Office Action was issued by the USPTO stating the trademark examining attorney had searched the USPTO's database of registered and pending marks and found no conflicting marks that would bar registration for the mark "METIS

NUTRITION” under Trademark Act Section 2(d), which included MET-Rx Substrate Technology’s MET-RX Trademarks.

10. On November 18, 2014, notice of the Application for the mark, “METIS NUTRITION”, was published in the USPTO’s *Official Gazette*.

11. On December 11, 2014, MET-Rx Substrate Technology filed a Notice of Opposition with the USPTO against FitLife Brands’ mark for “METIS NUTRITION.”

12. In the Opposition, MET-Rx Substrate Technology claimed it would be damaged by FitLife Brands’ mark for “METIS NUTRITION” because the “mark is confusingly similar to [the MET-RX] Trademarks whereby use of Applicant’s mark on the goods recited in Applicant’s application will create a likelihood of confusion, mistake or deception among the purchasing public.”

13. On February 19, 2015, FitLife Brands filed with the USPTO an Answer to MET-Rx Substrate Technology’s Opposition. The Answer argued FitLife Brands’ mark for “METIS NUTRITION” is not the same as or confusingly similar to the MET-RX Trademarks in terms of connotation, appearance and/or pronunciation. The Answer further claimed FitLife Brands’ mark for “METIS NUTRITION” is sufficiently distinct from the MET-RX Trademarks to avoid confusion, deception or mistake as to the source or sponsorship or association of FitLife Brands’ goods. Moreover, the Answer explained that FitLife Brands’ mark for “METIS NUTRITION” when used in connection with FitLife Brands’ goods, is not likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of FitLife Brands with MET-Rx Substrate Technology, or as to the origin, sponsorship or approval of FitLife Brands’ goods or services by MET-Rx Substrate Technology.

**II. MET-Rx Substrate Technology's Accusations of Infringement
and Threats of Litigation**

14. On March 4, 2015, FitLife Brands issued a Press Release announcing the “near-term launch of its new brand, Metis Nutrition, for the GNC corporate store opportunity.” This information was also published in industry-related periodicals, including BUSINESS WIRE, March 4, 2015 (*available at* <http://www.businesswire.com/news/home/20150304005158/en/FitLife-Brands-Builds-Track-Record-Innovation>). FitLife Brands has launched the Metis Nutrition brand into commerce.

15. MET-Rx Substrate Technology, through its counsel, has confirmed the allegations of infringement via written and verbal correspondence with counsel for FitLife Brands.

16. On or about June 30, 2015, FitLife Brands sold and shipped product bearing their "METIS NUTRITION" mark in interstate commerce.

17. On August 4, 2015, FitLife Brands launched a website bearing their mark "METIS NUTRITION," wherein the website also offers products for sale bearing FitLife Brands' mark "METIS NUTRITION" (*at* <http://metisnutrition.com>).

18. MET-Rx Substrate Technology's allegations and Opposition before the USPTO have created an actual, immediate, and substantial controversy between the parties concerning FitLife Brands' right to use the mark “METIS NUTRITION” in relation to the launch of its new brand, Metis Nutrition.

COUNT ONE

Declaratory Judgment of Non-infringement of Trademarks, 15 U.S.C. § 1051 et seq.

19. FitLife Brands repeats and realleges, as if fully set forth herein, the allegations contained in paragraphs 1-19 above.

20. MET-Rx Substrate Technology has claimed that FitLife Brands' intended use of the mark "METIS NUTRTION" constitutes trademark infringement and has threatened to bring a lawsuit against FitLife Brands on this basis.

21. MET-Rx Substrate Technology's allegations have put FitLife Brands in the position of either continuing to pursue arguably illegal behavior or abandoning that which it claims a right to do.

22. An actual, immediate, and substantial controversy has arisen between FitLife Brands and MET-Rx Substrate Technology concerning FitLife Brands' right to use the mark "METIS NUTRITION" in relation to the launch of its new brand, Metis Nutrition.

23. FitLife Brands seeks declaratory judgment from this Court that its use of the mark "METIS NUTRITION" does not constitute trademark infringement or otherwise violate the rights of MET-Rx Substrate Technology.

PRAYER FOR RELIEF

WHEREFORE, FitLife Brands respectfully request that the Court:

24. Enter judgment according to the declaratory relief sought;

25. Award FitLife Brands its costs in this action;

26. Enter such other further relief to which FitLife Brands may be entitled as a matter of law or equity, or which the Court determines to be just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38 and NECivR 38.1, FitLife Brands hereby demands a jury trial on all issues so triable.

DATED this 27th day of October, 2015.

Respectfully submitted,

McGRATH NORTH MULLIN & KRATZ, PC LLO

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